The Nuremberg Principles

WILLIAM V. O'BRIEN

One of the principal arguments for selective conscientious objection asserts that aggressive war, war crimes, and crimes against humanity are violations both of international and U.S. municipal law. When it appears to an American citizen that his nation is guilty of such crimes in a particular war, he clearly has a moral right, it is argued, and ought to have a legal right, to refuse participation in such criminal activity. I will attempt to assess the validity and relevance of this approach. In so doing I will treat of the following subjects:

(1) The content of the so-called "Nuremberg principles";

(2) The status of these Nuremberg principles in public international law and in the municipal law of the United States;

(3) The degree of relevance of each of the Nuremberg principles to the issue of selective conscientious objection;

(4) The practical issues of defining "participation" in crimes violative of the Nuremberg principles and of the individual's capacity, responsibility, and legal right to make judgments about their interpretation and application to particular wars in which his country is engaged. In this last section I will also evaluate the present status of the laws of war.

The Legal Base for and the Content of the "Nuremberg Principles"

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Soviet Union, as well as nineteen other of the wartime "United Nations,"[1] established the Nuremberg International Military Tribunal to try the so-called "major" German war criminals. The legal foundation for the trial was two-fold:

(1) As belligerents the "United Nations" had the right to try captured enemies for violations of the international law of war.

(2) As conquerors exercising supreme authority in Germany, the victorious Allies in the war in the West had the right to try German nationals and others who would have been under the jurisdiction of the deposed German state.

The Nuremberg International Military Tribunal was established for major war criminals "whose offenses have no particular geographical location." [2] In addition to this tribunal, virtually all of the victorious allies established their own tribunals to try the so-called lesser war criminals either on the grounds that their alleged crimes had occurred within the territorial jurisdiction of the tribunal, now re-established by virtue of the defeat of the Axis powers, or because the individuals charged with war crimes were apprehended within their occupation zones. Thus the United States conducted a series of "Nuremberg trials" of individuals falling into the latter category and it was these trials that inspired the film *Judgment at Nuremberg.* These trials are reported in well-written and carefully edited reports published by the United States government. Overviews of the total number and nature of trials of the lesser war criminals may be obtained by consulting the United Nations War Crimes Commission *Reports* and by Appleman's *Military Tribunals and International Crime.*[3] For the dedicated scholar, a careful perusal of the *International Law Reports,* which covers many of the national tribunal trials of war criminals would be worthwhile.[4]

There are really four major substantive offenses defined by the London Charter and applied by the judgment of the International Military Tribunal. There are, in addition, two overlapping principles prescribed by the London Charter and applied by the Tribunal which are relevant to the issue of selective conscientious objection. Article 6 of the London Charter gives the Tribunal power "to try and punish persons [the major war criminals],

acting in the interests of the European Axis countries, whether as individuals or as members of organizations," for the following crimes:

"(a) *Crimes against the peace:* Namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

"(b) *War crimes:* Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

"(c) *Crimes against humanity:* Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[5]

To these three categories of crimes—crimes against the peace, war crimes, and crimes against humanity—was added a somewhat ambiguous and controversial fourth count, (d), *conspiracy to commit any or all of the three categories of crimes, viz.:* "Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[6]

It is essential to distinguish between these categories of crimes. The second category, war crimes, was not a new one, although proceedings under this rubric on such a large scale were unprecedented. The novel aspect of the Nuremberg trial of the major war criminals and the real source of the charges of "Victor's Justice" and *ex post facto* condemnations was, on the one

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hand, the new concept of crimes against the peace, i.e., of illegal aggressive war, and, on the other hand, of individual liability for such crimes. For under older international law concepts such alleged crimes would have been considered "acts of state" for which there should only be corporative or community responsibility and punishment.

The question at Nuremberg, which is still controverted, was whether so-called aggressive war had been legally outlawed by the time of the Nazi invasions. Today there is no question but that unilateral first recourse to armed force is *prima facie* aggression. Today we have also established that, circumstances permitting (and they seldom do), individuals may be tried for complicity in wars of aggression, just as they have long been subject to trial for violations of the laws and customs of war.[7]

The third count, crimes against humanity, is of interest because of its recognition of higher law standards and their relation to an incomplete and developing positive international law. In practice, however, crimes against humanity were usually merged with the category of war crimes, e.g., the new and dreadful concept of genocide, a crime against humanity, also involves gross violations of the traditional law of belligerent occupation.[8]

In order to narrow down our discussion to the real legal and moral issues that are relevant to the selective conscientious objector, I would like first to dispose of three of the "Nuremberg principles" which, I contend, are not of central interest for this discussion, and then to turn to a more detailed examination of the two overlapping principles regarding the defenses of superior orders and of acts of state. The three Nuremberg principles which I consider relatively unimportant to the debate over selective conscientious objection—but which are raised in discussion on this subject—are the following:

(1) The concept of crimes against the peace, or aggressive war;

(2) The concept of genocide as a crime against humanity;

(3) The concept of conspiracy to commit any of the three categories of crimes.

Irrelevant Issues

As regards crimes against the peace ("planning, preparation, initiation, or waging of a war of aggression, or war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing") we must emphasize that the characterization of a war as an illegal aggression does not brand every single participant on the aggressor's side as a "criminal." The contention that all participants in an aggressor's military forces were in principle criminals who might then be granted various excuses was put forth at Nuremberg by the French prosecutor, M. de Menthon. The Court implicitly rejected this approach and it was explicitly rejected by American Nuremberg tribunals.[9] However, either the logic or the propaganda potential or both of this approach has been used by Communist belligerents, notably by the North Koreans and Chinese Communists in the Korean War. All U.N. prisoners of war were declared aggressors and criminals in principle. Extension of normal legal rights to them was portrayed as a generous but legally unnecessary gesture.[10] But the proper view is that the illegal character of a war does not taint all members of the aggressor's armed forces with criminality under international law.

Consequently, I think that for the conscientious objector the real relevance of crimes against the peace lies not in the danger of his being made a war criminal simply by serving in the armed forces of an illegal belligerent but that such crimes reinforce his contention that in positive international law—as well as in individual moral judgments—there are such things as aggressive, illegal wars which ought not to be supported. But the issue of participation, not as a top decision-maker but as an ordinary soldier, in what is believed to be an aggressive, illegal war, is one of individual morality, not of international law.

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the U.N. General Assembly on December 9, 1948, and entered into force on January 12, 1951, states that, "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[11]

Under Article IV of the Convention, "persons committing genocide . . . shall be punished whether they are constitutionally responsible rulers, public officials, or private individuals."[12] Article V obligates contracting parties "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions" of the Convention.[13] Under Article VI, "persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[14] It should be pointed out that *no* international criminal tribunal exists and none is likely to come into being in the present divided world. Hence the Genocide Convention is essentially dependent for enforcement on individual states which obtain custody over alleged violators of the Convention. Moreover, Article VII asserts that genocide shall not be considered as a political crime for the purpose of avoiding extradition in accordance with laws and treaties in force.[15] (Normally, extradition, i.e., transfer of a fugitive from justice from one sovereign jurisdiction to another, is limited to persons charged with acts which are criminal in both jurisdictions, and does not apply to political refugees.)

The concept of genocide in international law was the most important product of the debates and decisions about "crimes against humanity" that occurred in international and national war crimes proceedings, in the U.N., and in diplomatic and general political discussions following World War II. The term itself was coined by Raphael Lemkin[16] and it has a very definite historic meaning. Quite simply, genocide is what the Nazis and their allies did to the Jews and, to a lesser extent, to the Poles and other occupied peoples, and to such supposedly inferior groups as the gypsies. Genocide involves the systematic destruc-

tion of a group of human beings, to use the language of Article II of the Convention, "as such." Such destruction is not based on any argument of military necessity; it applies both in peace and war.

I emphasize the historic meaning of and normative rationale underlying the concept of genocide because the term has been widely, loosely, and most irresponsibly tossed around in the debates over the war in Vietnam which, above all else, occasions our present concern with selective conscientious objection. The term has been used by respected critics of the war as well as by enemy propagandists. Such usage is invalid in terms of law and mischievous in terms of informed public debate and international intercourse.

Killing many people (including noncombatants on a large scale), destroying vast areas of property, perpetuating a war which wears down the material and moral fiber of a nation—all these may be "war crimes" because of the means employed or because of violations of the principle of legitimate military necessity which requires proportionality between admissible political-military ends and the means employed to achieve them, or because of disproportionality between the probable good likely to emerge from a war and the demonstrable and projected evils resulting from it. But all these questions concern the justice of recourse to force in the first place, the reasonableness of continuance of the war in the second place, and the legality and proportionality of the means employed in the third place. In any event, they are questions of "war," not "genocide." In my opinion, however, the present indiscriminate use of the term by critics of U.S. defense and foreign policies is invalid and irrelevant to the SCO issue.

The charge of conspiracy to commit any of the three major categories of war crimes is perhaps the most irrelevant of the Nuremberg principles insofar as selective conscientious objection is concerned. First, it was developed to deal with an aggressive totalitarian state dominated by one man and his omnipotent party and all-powerful, repressive government. Despite all of the wild analogies that have been made between the Nazi society

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and the much advertised "Military-Industrial" complex, there is simply no way of establishing a plausible "conspiracy" theory with respect to contemporary American society.

Second, the concept of "conspiracy" at Nuremberg was an Anglo-American contribution which the French and Russians apparently either never entirely understood or cared about.

Third, and most important as concerns our subject, the selective conscientious objection problem obviously does not involve Secretaries Rusk or McNamara or Clifford or Generals Wheeler or Westmoreland. Nobody has to volunteer to serve in the government at such a level as to render him guilty of conspiracy in the Nuremberg sense, unless one wishes to argue that the Secretaries of Health, Education and Welfare or Housing and Urban Development are as much to blame for the war in Vietnam and SAC's contingency plans for nuclear deterrence as if they were adjacent to the Pentagon war room. I will return to this theme in my closing observations about "participation" in unjust wars.

The foregoing subjects are comparatively irrelevant to our problem but because they have been raised they had to be considered before they were dismissed.

Relevant Issues

Now let us turn to the real problems raised by the Nuremberg principles for the issues of selective conscientious objection. They are three-fold:

(1) The denial of the fighting man's recourse to superior orders and act of state as legitimate defenses.

(2) The existence of a body of international law governing the conduct of war, much of which is clearly part of the municipal law of the United States, and much of which is notoriously violated in modern wars.

(3) The possibility that an American fighting man may be captured and tried as a war criminal under rules which the United States took the lead in establishing and promulgating; or, alternatively, that he may be tried by a U.S. Court Martial for violations of U.S. and international law.

The Denial of the Defenses of Superior Orders and of Act of State: As we have observed, in contrast to the charge of crimes against the peace, which was a new, controversial, post-1918 concept, the concept of war crimes (violations against the law of war for which a belligerent could punish a captured enemy) was not new. What was new at the Nuremberg Trial of Major War Criminals and the lesser trials that followed was the prosecution of large numbers of individuals for such violations. On the whole, in previous wars sanctions for the law of war had taken one of two forms:

(1) reprisals;

(2) reparations imposed upon the defeated state by the victor.

The classic view in international law tended to be that in the execution of its chosen policies a state's armed forces engaged the corporative international legal responsibility of the state rather than the individual persons executing the policies. If punishment was justified and possible it should be directed against the state *qua* state rather than toward individuals, statesmen, commanders and troops. The efforts of the Allies of 1918 to change this attitude were almost entirely unsuccessful. Indeed, it is interesting to recall that the U.S. delegation to the Versailles Conference opposed the other Allies on the issue of individual responsibility—under international law—for alleged war crimes, basing their objections on classical international law doctrine.[17] Defense counsels at all the Nuremberg war crime trials laid heavy stress on the traditional concept that only the state as an international person is legally responsible for its acts and that, therefore, war crimes proceedings should be limited to cases of individual misbehavior, e.g., pillage, rape, voluntary acts of cruelty and destruction. They did not get very far.

In the first place, the Tribunal was bound by the London Charter of August 8, 1945, and the Charter explicitly ruled out the defenses of act of state or superior orders as a *complete* defense for alleged war crimes. This is one of the disturbing features of the Nuremberg precedent. One is impelled to wonder what would have happened if the judges, in their own minds, had

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come to a different decision. Could they have violated the rules of the London Charter on the grounds that their own reading of international law was different? In any event, the Tribunal appears to have honestly concluded that law and justice vindicated the Charter's handling of the questions and, as we will show, the precedent was established. Whether it was entirely fair at the time is not relevant to the issue of selective conscientious objection. The precedent is there, it has come to be widely accepted in international law, and it must be taken into consideration in judging the issues of selective conscientious objection.

In summary, then, the Nuremberg principles most relevant to this issue in the debate on selective conscientious objection are:

(1) There are violations of the international law of war, i.e., the so-called *jus in bello* governing the conduct of war, for which individuals may be tried either before international tribunals when such come into existence, or before the national military tribunals of foreign powers which capture an individual serviceman in war or obtain jurisdiction over him in some other manner.

(2) The prevailing view in international law, based upon the Nuremberg precedents, is that neither an act of state nor the plea of superior orders is a complete defense for such violations, but that a fair court, following the Nuremberg precedent, would make a judgment as to the degree of "moral choice" which the accused actually had when, under orders, he perpetrated the illegal acts of which he is accused.

The Status of the Nuremberg Principles in Contemporary International Law and in U.S. Municipal Law: To assess the current legal status of the Nuremberg principles we must first say a word about the relation between public international law and the municipal (i.e., domestic) law of the United States. Under Article VI of the Constitution, treaties are the law of the land and have an effect equal to legislative enactments, executive decrees within the President's competence, and judicial decisions. If there is a disparity between a treaty provision and a legisla-

tive or other valid provision of U.S. law, the later in date prevails if the provisions cannot be reconciled. The presumption is that conflict between treaty provisions and legislation is not intended and the courts will attempt to find a construction which will avoid ruling for one provision over another. If a treaty provision is overridden by legislation and/or the judicial or executive branches, U.S. law has changed but U.S. obligations under international law have not, and the other parties to the broken treaty have a right to secure remedies under international law.[18]

Executive agreements are made by the executive without the advice and consent of the Senate as in the case of treaties. Nevertheless, the courts have ruled that executive agreements are just as binding in domestic law as are treaties and the same rules of interpretation apply to them in the event of an apparent conflict with domestic law as obtain in the case of treaties.[19] The London Charter of August 8, 1945, was an executive agreement. It laid down legal principles to guide U.S. and Allied prosecutors and judges in dealing with enemy war criminals. It did not, of course, deal with possible U.S. or other United Nations war criminals, but I would hope that it would be unthinkable for any U.S. government to take the position that the legal principles prescribed for accused enemy war criminals ought not to be taken as guidelines for the conduct of U.S. forces. The United States was in the war crimes prosecution business on a very large scale in the immediate postwar years. Moreover, the United States took the lead in obtaining support from the various organs of the United Nations, particularly the General Assembly, for the Nuremberg principles which we have summarized.

It would be clear from even the briefest summary of consideration of the Nuremberg principles within U.N. organs—even before turning to other relevant sources of international law—that the state of the law does not turn on such questions as "victor's justice" and *"ex post facto"* judgments. The Nuremberg principles are widely, if not universally, accepted as binding norms of international law. The United States took *the* leading role in producing this state of affairs, so the principles are certainly binding on the United States.

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But the issue of the relevance of international state practice, amounting to customary international law, should be touched briefly. In the landmark case, *The Paquete Habana, The Lola,* the Supreme Court of the United States said:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly determined for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. . . .[20]

The force of this statement on the relation of U.S. municipal law to international law may have, in some subject areas, been diminished by the U.S. Supreme Court's decision in the Sabbatino Case.[21] But the position of the *Paquete Habana* decision on the binding quality of customary rules of international law in the realm of the law of war remains relevant and binding to the SCO issue.

The United States has repeatedly gone on record as an adherent to the Nuremberg principles. The most central is the U.S. Army's Field Manual 27-10, *The Law of Land Warfare,*[22] which summarizes and interprets the general principles of the law of war, the conventional law of the Hague and Geneva conventions, and other sources of the law of war. FM 27-10 and its Navy counterpart, Robert W. Tucker's *The Law of War and Neutrality at Sea,* appear to be consonant with the position taken in my study with respect to war crimes, and the defense of superior orders.

In an even more concrete fashion, the U.S. government has recently demonstrated its respect for the Nuremberg principles in two highly controversial cases. In the court martial proceedings against Captain Howard B. Levy at Fort Jackson, South Carolina, concerning Levy's anti-Vietnam war, anti-Green Beret statements and agitation, trial officer (judge) Colonel Earl V. Brown

ruled on May 17, 1967, that (in the words of Washington *Post* reporter Nicholas von Hoffman), "if the defense can prove that the United States is committing war crimes in Vietnam as a matter of policy he will acquit the young Army doctor of willfully disobeying an order to train Special Forces medical aides."[23] The burden thereby placed on counsel for the defense proved insuperable and on May 25, 1967, Colonel Brown ruled that:

> While there have been perhaps instances of needless brutality in this struggle in Vietnam about which the accused may have learned through conversations or publications, my conclusion is that there is no evidence that would render this order illegal on the grounds that these men would have become engaged in war crimes or some way prostitute their medical training by employing it in crimes against humanity. . . .[24]

There have, moreover, been court martial trials of U.S. military personnel charged with violations of the laws of war. One of the most recent was the trial in South Vietnam of S/Sgt. Walter Griffen, who was convicted in July, 1967, of unpremeditated murder in the killing of a Vietnamese prisoner although he testified that he had acted on the orders of his commanding officers.

U.S. municipal law, then, has recognized those Nuremberg principles most relevant to the SCO problem, namely, individual criminal liability before international or domestic tribunals for violation of the conventional law of war, of which there is a substantial body, and of the customary international law of war. The U.S. also recognizes the illegality of crimes against humanity, including genocide. U.S. law also rejects almost completely the plea of superior orders as a complete defense but follows the general line of the Nuremberg precedent and the general practice of states as reflected in discussion and resolutions of the organs of the United Nations and in national war crimes legislation and proceedings in holding out the possibility that superior orders may be considered, on a case-by-case basis, as a mitigating circumstance warranting diminishment of and possibly exemption from punishment, for acts which constitute war crimes.

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reover, been court martial trials of U.S. mili- arged with violations of the laws of war. One was the trial in South Vietnam of S/Sgt. Wal- vas convicted in July, 1967, of unpremeditated ing of a Vietnamese prisoner although he testi- cted on the orders of his commanding officers. law, then, has recognized those Nuremberg levant to the SCO problem, namely, individual before international or domestic tribunals for nventional law of war, of which there is a sub- l of the customary international law of war. gnizes the illegality of crimes against humani- cide. U.S. law also rejects almost completely r orders as a complete defense but follows the e Nuremberg precedent and the general prac- flected in discussion and resolutions of the or- l Nations and in national war crimes legislation in holding out the possibility that superior or- idered, on a case-by-case basis, as a mitigating ranting diminishment of and possibly exemp- nent, for acts which constitute war crimes.

is mixed. While U.S. military tribunals have

heard arguments and evidence relative to alleged violations of the Nuremberg principles and the laws of war by U.S. forces, the federal courts thus far seem to have considered these principles irrelevant to cases of refusal of military service based specifically on the grounds that the U.S. involvement in Vietnam violates the Nuremberg principles generally and, specifically, the Treaty of London of August 8, 1945, as well as other treaties on war to which the United States is a party. In *U.S. v. David Henry Mitchell III,* the U.S. Court of Appeals (2nd Circuit) upheld a District Court's conviction of the defendant for willful failure to report for induction into the Armed Forces.[25] Mitchell "made no claim to be a conscientious objector but sought to produce evidence to show that the war in Vietnam was being conducted in violation of various treaties . . . and that the Selective Service system was being operated as an adjunct of this military effort."[26]

Upholding the District Court's ruling that evidence in support of these contentions was "immaterial," Judge Medina said that, "Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service and our nation's efforts in Vietnam, as a matter of law the congressional power 'to raise and support armies' and 'to provide and maintain a navy' is a matter quite distinct from the use which the Executive makes of those who have been found qualified and who have been inducted into the Armed Forces. Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress."[27]

The Supreme Court denied certiorari without comment, except for a dissent by Justice Douglas. In his dissent, Douglas specifically cites Article 6 (a) of the London Treaty concerning the crime of aggressive war and individual responsibility for participation in this crime. Douglas also quotes the language of Article 8 of the Treaty regarding superior orders.[28] Douglas claimed that the Mitchell case raised five major questions which ought to be considered in the light of the London Treaty which, whatever its constitutionality or fairness in 1945, "purports to lay down a standard of future conduct for all the signatories."[29]

Justice Douglas concluded his dissent by disavowing any opinion on the merits. But he favored certiorari by the Supreme Court, saying, "We have here a recurring question in present-day Selective Service cases."[30] On November 6, 1967, the Supreme Court once more denied certiorari in a case touching in part on the Nuremberg principles. In this case three privates, already in service, sought to bar the Department of Defense and the Army from sending them to take part in "the illegal and immoral Vietnam conflict."[31] This time Justice Potter Stewart joined Douglas in dissenting and urging that the issues raised by the appeal be dealt with by the Court.

This latter case is not clearly based on the Nuremberg principles. It turns mainly on the U.S. constitutional law question of the existence of a state of war. For our purposes the case is of significance because of the support given Douglas by Stewart and the modest prospect that there might be a trend toward reversal, or at least serious reconsideration of, the Court's position that the issues in both cases are political and military and, hence, not within the jurisdiction of the federal courts.

It should be added that although the main point in the most relevant case, *U.S. v. Mitchell,* as discussed in Medina's opinion and Douglas's dissent to the Supreme Court's denial of certiorari, is the legality under municipal and international law of the U.S. involvement in the Vietnamese conflict, Mitchell also charged war crimes and crimes against humanity. But it seems at present unlikely that the federal courts will judge on the merits *either* of allegations that the U.S. is guilty of crimes against the peace or of war crimes and crimes against humanity. This is so not only because of the present attitude of the Supreme Court and other federal courts, but because of the whole history of judicial reluctance to interfere with the Executive's exercise of the war powers, or even with the intricate relations between the Executive and the Legislative branches in determining when war exists and what war powers may be properly exercised by the Executive without explicit Legislative authorization.[32]

The Practical Likelihood That an Individual Soldier May Be Placed in Circumstances Obliging Him in One Way or Another

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to Commit and Be Tried for War Crimes: This remains the core of our inquiry. I will address this subject in two ways. First, I will summarize the record of the principal war crimes proceedings and report on what happened to ordinary soldiers accused of war crimes after the Second World War. Second, I will discuss in a purely speculative way the subject of "participation" in aggressive wars and wars in which war crimes are allegedly committed.

The 15-volume series edited by the United Nations War Crimes Commission summarizes in its first 14 volumes 89 war crimes cases tried before national tribunals against individuals who had allegedly violated international law and were physically within the territorial jurisdiction of the tribunal and/or individuals who were accused of violations of the law of the forum. In many instances there were numerous defendants, all tried in the same proceedings. The cases therein reported do not begin to reach the total number of such cases, some of which continue, as in the Federal Republic of Germany, to this day. But the series does cover quite well the best known of the so-called lesser war crimes proceedings, i.e., all of those other than the Nuremberg International Military Tribunal's decision and its Tokyo counterpart. I have searched through these fifteen volumes to find specific cases relevant to the issues of selective conscientious objection on the grounds of justifiable fear of trial as a war criminal. It must be said that the results of this inquiry yielded little that is of relevance to the problem of selective conscientious objection. (Note that the "United Nations" commission was an organ of the wartime alliance, not of the U.N. founded at San Francisco in 1945.)

If one begins with Chapter VII of Volume 15 of the series, "Defence Pleas," the prospects for finding arguments relevant to the issues of selective conscientious objection seem promising. After having noted that the Nuremberg International Military Tribunal, following the London Charter, had ruled out "superior orders" as a complete defense but permitted its consideration as a mitigating circumstance, the U.N. War Crimes Commission goes on to analyze the practice of the national tribunals whose decisions were summarized in the preceding 14 volumes. It is

noted that three pleas were advanced very frequently, often overlapped, and were sometimes confused. These were:

(1) the plea of superior orders;

(2) the plea of duress;

(3) the plea of "necessity."[33]

These three pleas are then described and considered by the United Nations War Crimes Commission as they applied in various trials.

The pleas of superior orders and duress overlapped and they were in fact taken into account in mitigation of punishment. I will summarize some cases on these issues but at this point I will dispose of the third plea mentioned by the U.N. War Crimes Commission: "necessity," or "military necessity." The principal cases in which military necessity is discussed have to do with very high military commanders, not ordinary enlisted men or even junior officers. They are not, therefore, very relevant to the problem of selective conscientious objection. Whatever the moral dilemmas of generals and the intricacies of the concept of total command responsibility set forth in the case considered, our concern is for the "common man" who, out of moral or other scruples, demands the right to refuse military service in a particular war. Therefore I intend to pass over the otherwise interesting and complex plea of military necessity for violation of the normal laws of war.[34]

This brings us to the further and most basic point which emerges from the citations accompanying the general analyses of the pleas of superior orders and duress. Most of the precedent-making cases involved either or both of the following categories of defendants:

(1) High level commanders or governmental officials;

(2) Persons, at whatever level, who served—presumably by choice—in *élite* organizations or in particular kinds of operations which, whatever their last-minute scruples, predictably put them in positions wherein their commission of the criminal acts of which they were accused was foreseeable and likely. Out of all the 89 cases reported in the fifteen-volume *U.N. War Crimes Law Reports* only ten appear to bear directly on the problem of

comparatively minor persons, whether commissioned or enlisted personnel, being ordered to commit war crimes, and, of those ten, six concern German SS units. No doubt an intensive study of the national tribunal cases reported in the *Annual Digest of Public International Law Cases* and the *International Law Reports* would produce more cases of war crimes proceedings against involuntary war criminals. But certainly a survey of the U.N. War Crimes Commission's reports produces little that is of direct relevance to the issues of selective conscientious objection.

Practical Issues

In order to come down to the practical SCO issues of allegedly illegal wars, war crimes, and criminal participation in either or both, I propose to break this section down into three subjects:

(1) The judgment that one's nation is engaged in a war contrary to binding rules of international law;

(2) The judgment that, regardless of the legal permissibility of one's nation's recourse to force, illegal means are known to be in use to the point that the individual citizen has a right to disassociate himself from a war characterized by substantial recourse to such means;

(3) The judgment that *any* "participation" in a war which is illegal either in terms of the decision to have recourse to force as an instrument of foreign policy and/or the decision to use certain allegedly illegal means places the individual citizen in jeopardy of punishment under the Nuremberg principles and that, therefore, SCO has a valid basis in the Nuremberg precedents.

Judging the Legal Permissibility of Recourse to Armed Force by One's Nation: The state of the law with respect to recourse to armed force in international relations is simple and clear, but subject in practice to violent disagreements over facts and justifications. Today, all states are prohibited from first recourse to armed force as an instrument of foreign policy by virtue of the

U.N. Charter, particularly Article II (4).[35] The only legally permissible bases for recourse to armed force are participation in a U.N. enforcement action under Chapter VII of the Charter or individual and collective self-defense under Article 51 of the same chapter, a natural right which, I would contend, is not granted but merely reiterated by the Charter.[36] Thus it would be as illegal for the U.S. to launch an offensive to "liberate" Cuba from Communist rule as it would be for the Soviet Union to attack West Germany to liberate it from the rule of capitalist-militarist-*revanchist* cliques.

The practical problem, particularly since the Korean War and the establishment of the awful but seemingly effective world order of the nuclear balance of terror, is that international conflict seldom takes a clear-cut, aggressor-defender, invader-resister form. The most common form of modern international conflict is a deadly and complex combination of genuine domestic insurgency and substantial, often essential, support by so-called indirect aggression.

Whereas the rule of thumb in the League of Nations period was that the party which had failed to exhaust the peaceful remedies of the League and of general international law and organization and which had had first recourse to open armed force was the aggressor, the present state of international conflict makes judgments about the legal permissibility of war much more difficult. If for example, we were to eliminate, from the debate over the Vietnamese conflict all those who abhor war in principle on the one hand and all those who reject loss of American lives and treasure without the prospect of "victory" in the "national interest" on the other, we would probably come down to a debate over the facts and implications of the conflict, as to which party or parties did, in a meaningful, legally significant sense, start an international conflict engendering rights of collective self-defense on the other side. I think that it is demonstrable from the disagreements of highly informed statesmen, legislators, scholars, public figures, and concerned citizens that, simply in terms of one's own conscience, this is an extremely difficult decision to make.

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Now, if one is then to go on to the legal—as distinct from the moral, political, strategic, or other—judgment about selective conscientious objection to a war on the grounds that it violates the U.N. *régime* restricting recourse to force, the Nuremberg principle condemning aggressive wars, and general contemporary international law, I would have to say that it is relevant to the high-level decision-maker and, perhaps, to high-level military commanders. Scruples about the legality of a war might lead, first, to dissent within the decision-making process and, second, to resignation. But, in terms of international law, this problem is not, in my judgment, very relevant to the plight of the ordinary draftee or even to a junior officer. As has been explained, the law of Nuremberg, and of most of the trials of the lesser war criminals, holds that mere service in the armed forces of a nation which is subsequently found by some authoritative international body or court to have engaged in aggression is—in itself and without the commission of war crimes and crimes against humanity—not a crime under international law.

Prescinding from the possibility of unfair trials of "aggressors" or threats thereof by a detaining power, which would not be considered legitimate by an unbiased third party, fear of punishment as a war criminal for mere participation in the armed forces of an aggressor state is not justified in the light of contemporary international law doctrine and practice.[37] I conclude, then, that the issue of participation in "crimes against the peace" is not the central issue insofar as SCO based on the Nuremberg precedent is concerned.

I will not undertake in this paper to deal with the questions of U.S. constitutional law concerning the existence of "war" and the legality of the Executive's commitment of the nation to armed conflict without a clear-cut declaration of war by the Congress.[38] Selective conscientious objection on such grounds would, I think, provide a stronger case for the objector than reliance primarily on the Nuremberg principle prohibiting aggressive war. Were I counseling such an objector, I would advise him to bring in the Nuremberg principle regarding crimes against the peace as a secondary, in a sense "background" argu-

ment, in support of the primary argument based on U.S. constitutional law rather than on international law.

Judging the Means Used in Warfare: In relating the Nuremberg principles to selective conscientious objection, the heart of the matter I believe concerns the possible commission of war crimes and crimes against humanity, either under direct order or out of tactical or individual necessity. In considering this issue I will also raise an additional category which I will describe as "operational necessity." In so doing I hope to meet Professor Paul Ramsey's call for a survey of the relevant laws of war.

If we limit ourselves to international law as a basis for SCO, the problem of judging the means of warfare becomes complicated. Three categories must be considered:

(1) the problem of judging persistent violations of conventional international law (i.e., treaty law, the "law on the books") which violations also run counter to the general practice of states;

(2) the problem of judging persistent violations of the laws of war which appear to be so frequently violated in the practice of states as to render questionable their continued validity and relevance, even if such laws are affirmed in treaties and appear to be the "law on the books";

(3) the problem of judging means of warfare which have been the object of moral, humanitarian, and even utilitarian condemnation or criticism but which are not legally impermissible under existing positive international law, and are at best controversial. Unfortunately, from the legal point of view, this third category includes most of the decisive—and much criticized—means of modern warfare.

The first two categories are highly relevant to the subject of selective conscientious objection, particularly if the "law on the books," the conventional law of war, is binding under the domestic law of the objector's state, as is the case in the United States with respect to every major international convention on the laws of war, except the Geneva Protocol on Chemical-Biological Warfare of 1925 and the Genocide Convention. The third category is the most difficult. When dealing with it one cannot

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argue that one wishes to avoid violation of clearly established international law and, presumably, of the law of one's own country through the process of incorporation of international law into domestic or, as it is called by international lawyers, "municipal law."[39] One must argue on moral or other grounds about what the law *should be,* not what it is, and such arguments are beyond the scope of this paper.

With these distinctions in mind, I will examine three categories of offenses against the laws of war and humanity:

(1) violations of the law protecting prisoners of war;

(2) violations of the law governing the means of war;

(3) violations of the law protecting civilian populations in war areas.

All three categories overlap. However, this is the breakdown which the principal controlling international agreements adopted. Thus, the second category will deal, *inter alia,* with the limitations on the means of combat arising out of consideration for their effect on noncombatants, whereas the third category will deal with post-combat situations of belligerent occupation or, as is increasingly the case, ambiguous situations where the conventional forces of a belligerent are theoretically in a situation of belligerent occupation but in which indigenous and other resistance elements continue a sub-conventional conflict.

Prisoners of war have the following basic rights:

(1) The right to lay down their arms, surrender, and acquire the status of prisoner of war.[40] This right is reiterated in all of the Geneva Conventions of 1949 even for irregular forces in "armed conflict not of an international character," for soldiers who are *hors de combat,* having "laid down their arms."[41]

(2) The right to "humane treatment," as provided for in a number of treaties culminating in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.[42] In terms of the Nuremberg precedent, "murder or ill treatment of prisoners of war," is a "war crime."[43] We will not discuss the detailed rules of the POW *régime.*[44] For the purposes of this paper it is sufficient to mention several provisions of international law which have in fact often been violated and which are fre-

quently raised in criticisms of belligerent behavior in contemporary conflicts.

Common Article 3 of the four Geneva Conventions states in part:

> To this end [that POW's be treated humanely] the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity; in particular, humiliating and degrading treatment;
>
> (d) the passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[45]

Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 provides:

> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present convention. . . .
>
> Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.
>
> Measures of reprisal against prisoners of war are prohibited.[46]

Anyone who reads newspapers and news magazines, or who watches television, has read about and seen innumerable examples of violations of these rules. A typical catalogue of them is offered by Eric Norden in "American Atrocities in Vietnam" in *Liberation*, an anti-war periodical.[47] Although this is an adversary critique the sources are, for the most part, objective and the charges are, on their face, probably accurate. Likewise, *Vietnam and International Law*, a publication of the Lawyers Committee on American Policy Towards Vietnam—composed of highly respected lawyers and scholars—asserts that:

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> Numerous reports and photographs published in the American world press indicate violations of international rules of warfare regarding, for example, the mistreatment of prisoners of war. . . .[48]

I take it that no knowledgeable person denies that these charges have considerable objective validity and that, in terms of international legal responsibility, the United States must answer for violations of the POW *régime* committed by U.S. military personnel and, to a lesser extent, by allies under the direction of or in the proximity of U.S. military personnel. I further assume that the fact, also widely acknowledged, that atrocities have been threatened or committed by the Vietcong and North Vietnamese troops against those who are POW's under international law standards, would *not* justify violation of the 1949 conventions and of the customary and conventional law on the subject that developed prior to 1949.

In short, I assume that it is "given" in the war in Vietnam (and in most foreseeable international conflicts including so-called U.N. "police actions" or "peace-keeping" operations wherein combat breaks out)[49] that violations of the international law *régime* of POW's have occurred and will continue to occur. It is at this point that we are obliged to return to the difficult but inescapable distinction between violations of treaty law which are unusual and those which are fairly common in the practice of states. First, it is a simple historical fact that, in modern times, most combatants desiring to surrender were given quarter and POW status; most of them did survive and, ultimately, return to their homes, although there have been millions —out of hundreds of millions—who were denied the rights of surrender, POW status, and protection. But the kinds of violations of POW rights described in Norden's article, and referred to by the Lawyers Committee are quite familiar—lamentably—to war veterans and to military historians. In *every* war there are innumerable instances of denial of quarter. This may result from a risky tactical situation, from outrage against recent enemy atrocities, or simply from frustration and grief over heavy losses recently suffered. Moreover, all armies include vicious and depraved individuals who murder and mistreat POW's.

But, on the whole, it seems highly unlikely that a reluctant participant in a war will be obliged to deny quarter. The exception would be the case of a desperate tactical situation where an individual or an entire unit might be ordered to deny quarter and to kill wounded or unwounded prisoners. Generally speaking, such an order ought to be disobeyed. A moralist would presumably have problems with the extreme case of duress. A lawyer could only say that denial of quarter, for any reason, is legally impermissible and that necessity or duress or superior orders would be no defense but ought to be considered in the category of possible mitigating circumstances. But if we try to link the likelihood of confronting such orders and situations with the issue of SCO on the grounds of the Nuremberg principles, it seems to me we are again stretching rather far to justify SCO. Nevertheless, this is a real issue and should be discussed further as the debate over SCO continues.

The issue of torture is much more central, critical, and intractable. The moral, legal, and practical dilemmas of this subject can hardly be exaggerated. The facts are well known. Most modern wars involve a high degree of sub-conventional, guerrilla warfare. The identity of enemy combatants and terrorists is sometimes almost impossible to establish by normal, legal, intelligence techniques. Fruitful interrogation of captured enemy troops and of persons in civilian clothes suspected of belligerent activities becomes the key to success in the conflict. All of the positive counter-insurgency methods of nation-building and gaining the allegiance of the population are frustrated if the enemy is sufficiently powerful, patient, and ruthless. Enlightened counter-insurgency measures have often failed in the face of guerrilla warfare and terror. If, as Norden and others claim, the United States is fighting in Vietnam the "dirtiest" war in its history, it is not surprising. The theory and practice of wars of "national liberation" are very dirty, by Western and international law standards, and are expressly designed, among other things, to *force* the counter-insurgent forces into "dirty" behavior in self-defense.[50]

But if selective conscientious objection to "particular" wars turns in considerable measure on repugnance to the practice of

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torture, then SCO will be *very* selective indeed. The selective CO will have to be exempted from virtually all contemporary conflicts, particularly those—which are the most likely—involving guerrilla warfare and terrorism in underdeveloped areas. It seems almost unnecessary to make the point that actual involuntary participation in torture is rather unlikely. Seemingly, in all armies and police forces, there are people who are willing to do the dirty work of torture, for various reasons, some of them very evil. In any case, there is no avoiding the dilemma. Torture of POW's is clearly prohibited by international law. It is practiced almost universally in modern conflicts. The relevance of the Nuremberg precedent would seem to be limited to the case of widespread, indiscriminate, systematic, often pointless and sadistic torture.

I doubt, but cannot prove, that the United States and its allies in the Vietnamese conflict have come so close to such a monstrous system of torture as to warrant SCO on the basis of the Nuremberg and other international law prescriptions regarding the protection of POW's. However, I readily grant that the existence of such practices might well produce conscientious objection, either selective or general. But, as I have indicated, I have a feeling that the more defensible position would be general objection to *all* modern wars, for it will seldom be the case that a modern war will be conducted without recourse to some kind of torture as a standard operating procedure in the interrogation of POW's and civilians suspected of belligerent sympathies or activities.

There are a number of ways of approaching the subject of the law governing the conduct of hostilities. Some authorities and decision-makers operate on the assumption, explicit or implicit, that, in the final analysis, there are no legal restrictions on "military necessity" as defined by the responsible commander or government official.[51] This attitude is clearly rejected by the Hague Conventions on Land Warfare of 1899 and 1907, by the four Geneva Conventions of 1949 mentioned above,[52] and by numerous earlier conventions that were supplemented or replaced by the 1949 conventions[53] and by the Nuremberg principles rela-

tive to war crimes and crimes against humanity. Such an attitude has been expressly condemned by every U.S. military field manual on the law of war since 1863.[54] In terms of our discussion, the only relevant question, then, for an American who respects international law and the treaty commitments of the United States, which are the supreme law of the land under Article VI of the Constitution, is, "What is the content of the international law of war with respect to the conduct of hostilities?"

The answer is difficult. Respected authorities have held that everything is permitted in combat which is not clearly prohibited.[55] As will be demonstrated, few of the principal means of modern warfare are regulated by binding international agreements. The practice of contemporary belligerents is notoriously permissive. The content of the law governing hostilities, the *jus in bello*—the law *in* war—is therefore determined, in the eyes of legal authorities, largely on the basis of their own understanding of international law, the manner in which it is made, and the proper techniques of interpreting and applying it. At present, then, the content of the *jus in bello* depends a great deal on the extent to which basic *principles* governing the conduct of hostilities are accepted. These principles may be divided into two categories: (1) negative prohibitions, i.e., principles stating what ought not to be done in war; (2) positive guidelines, principles stating what may be done, i.e., which measures a belligerent has a legal right to take. It should be noted that one of the most difficult problems involved in discussing this area is that it is often controverted, first, whether a prescription is a general principle or an ironclad rule, and, second, whether a principle or a more specific rule which was once widely accepted has survived long and widespread violations.

The most widely discussed prohibitions are the following:

(1) the prohibition against the intentional killing, or otherwise injuring, or attacking the rights, of noncombatants;

(2) the related prohibition against attacks on "non-military" targets;

(3) the likewise related prohibitions against "blind," or "indiscriminate" means of warfare which, by their very nature,

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cause indiscriminate injury in populated areas or which "take out" very large populated areas in which, by any standard, significant numbers of noncombatants are known to be present;

(4) the prohibition, under the so-called "St. Petersburg principle" of the use of weapons which cause "superfluous suffering";

(5) the prohibition against "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices," as well as "the use of bacteriological methods of warfare";[56]

(6) the prohibition, to use the language of the London Charter of 1945, of "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."[57]

It is important to point out that principle or rule 6 is distinct from rules one to three. It is derived from Article 23 (g) of the Hague Rules of Land Warfare and, in the practice of the Nuremberg International Military Tribunal and the other war crimes tribunals, applied primarily to the action of *ground forces,* not to aerial attacks. The most frequent charge under this category was indiscriminate recourse to inhumane "scorched earth" policies or retaliatory destruction of whole villages or areas, mainly by ground forces. The importance of this distinction and of the comparative status in international law of the various principles and/or rules will become evident shortly.[58]

There was a time when principles (or rules—authorities differ) were widely held to be binding under customary international law, although they were never explicitly agreed to in a convention of the stature of the Hague Conventions on Land Warfare of 1899 and 1907.[59] The fact is that these first three principles, as positive law, did not survive World War I. What I have called "operational necessity" rendered them impossible of observance. The weapons, the means of transportation and communication, the size of the forces, the difficulty of defining "noncombatant" and "non-military target" in a "total war," as well as the fanatical character of contemporary conflict, all resulted in such widespread violations of the first three principles that they ceased to create valid expectations of observance. Any statesman or military commander relying upon them as stan-

dards of behavior by an enemy ought rightly to be deposed and placed in a mental institution.

This does not mean that might—or technical facts—make right. It may mean that modern war is intrinsically immoral, as more and more people have come to believe. But in terms of the universal practice of belligerents of every type the first three principles represent, at best, goals, guidelines, preferred rules of the game to be observed if possible, but not legally binding prescriptions.[60] By the end of World War II the most distinguished authorities were reduced to stating that international law prohibits direct, intentional attack on persons and targets that have no conceivable military significance, an ambiguous and essentially irrelevant prohibition.[61]

Before proceeding to prohibitions four to six, which are to be taken more seriously in terms of binding international law, I would like to turn to the second category of general principles, a category which can be summed up in the concept of *proportion* between ends and means and which I have characterized as the principle of "legitimate military necessity."[62] Many authorities would frame this principle in the negative and make it a prohibition of disproportionate means. Following the tradition of the original U.S. Army field manual and the logic of the concept of the right of self-defense, I prefer to formulate the principle in the following, positive fashion:

> Military necessity consists in all measures immediately indispensable and proportionate to a legitimate military end, provided that they are not prohibited by the laws of war or the natural law, when taken on the decision of a responsible commander subject to judicial review.[63]

The latter part of that definition was strongly influenced by the vast accumulations of war crimes proceedings following World War II. Since the Korean and other conflicts revealed that the conditions of "victory" requisite to conducting war crimes trials were seldom present and since hopes for international criminal tribunals have so far proved vain, I have broadened my concept of review to mean review by a commander's superiors, by his allies, and by unbiased third-party opinion.[64]

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No matter what one thinks about wars such as that in Vietnam, it seems to me quite clear that they are more limited than they might otherwise be because of the moderating influence of domestic criticism, enlightened policies of self-restraint by responsible statesmen and commanders, the attitudes of co-belligerents and political allies, and by "world opinion," which, whatever its content, dynamics, and objectivity, patently exists as a major factor in international politics to which all participants in the world arena pay a great deal of attention.

It is my belief that the interaction of policies and claims regarding their legal permissibility in the area of regulation of combat practices produces customary international law. The efforts of responsible statesmen and commanders to give content to the concept of legitimate military necessity may well produce prohibitions, or at least legal presumptions, against attacks involving the killing of large numbers of noncombatants or of whole populated areas. Indeed, I believe an argument can be made that there are emerging a number of tacit "rules of the game" as between the nuclear powers, the most important of which may be a prohibition of *first* recourse to nuclear weapons in *any* form.[65] I would further argue that this rule applies to so-called "counter-city" attacks on population centers with conventional means and that the "city-busting" air-raids of World War II are now viewed in retrospect with remorse and with a feeling that they were not justified in terms of military utility much less in terms of normative standards.

Still, the fact is that there was, during World War II, no adequate, binding international law prohibiting such raids. Ironically, although many *ground* commanders were tried and convicted as perpetrators of war crimes for "wanton" destruction (usually in extremely desperate strategic or tactical situations where the destruction was carried out in the interests of survival) there appear to have been no convictions of *Luftwaffe* or other enemy officers or their superiors for illegal air-raids.[66] It remained for a Japanese court, in a totally domestic litigation, to rule that the U.S. atomic attacks on Hiroshima and Nagasaki were contrary to international law.[67]

Judging Any Participation in "Illegal" War: In any event, this discussion recalls our earlier problem of relating SCO to the Nuremberg principles, war crimes trials, and international law. If an individual believes that the development of ever-more-effective and terrible weapons and their intrinsic incompatability with the first three principles protecting noncombatants and population centers makes all modern war immoral, then he is a CO, not an SCO. If he believes that serving in the same armed force with troops who mount counter-city air attacks—or, as we have discussed, torture prisoners—is contrary to his conscience, he is really a CO, not an SCO. As concerns modern weapons systems, willingness to employ them and the abandonment of moral scruples appear to change in proportion to their availability and the exigencies of foreign and defense policy, as both the Egyptians and Indians, for example, have amply demonstrated. If, on the other hand, the issue is true apprehension that military service may require close collaboration with those who order and execute policies violative of the former immunity of noncombatants and non-military targets from direct, intentional attack, I would reiterate my earlier argument that one can avoid service in the Air Force, one need not become an officer or even a noncom. This still leaves us, however, with the man who faces the draft and possible combat service in which he may very well be required to employ means violative of prohibitions four to six. We shall now examine these issues which are very close to the heart of SCO.

The fourth prohibition of classical international law relevant to our inquiry is that prohibiting the use of weapons which cause "superfluous suffering" and render death "inevitable." The legal basis for this principle, endorsed by the Declaration of St. Petersburg of 1868[68] and Article 23 (e) of the Hague regulations of 1899 and 1907 Respecting the Laws and Customs of War on Land which provides:

> . . . it is especially forbidden—. . .
> e. To employ arms, projectiles, or material calculated to cause unnecessary suffering.[69]

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The principal contemporary authorities on the law of war have emphasized the vague and subjective character of this principle.[70]

The main weapon discussed in current SCO debates is napalm, protest against which is almost the symbol of anti-war criticism of the Vietnam conflict.[71] In the light of this controversy it is instructive to consult the instructions of the U.S. Army's FM 27-10. Regarding "Employment of Arms Causing Unnecessary Injury," it is said:

> . . . [Hague Regulations, art. 23 (3)]
>
> b. *Interpretation.* What weapons cause "unnecessary injury" can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery, projectiles, mines, rockets, or hand grenades. Usage has, however, established the illegality of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets.[72]

Turning to "Weapons Employing Fire," the Army's Manual maintains:

> The use of weapons which employ fire, such as tracer ammunition, flame-throwers, napalm and other incendiary agents, against targets requiring their use is not violative of international law. They should not, however, be employed in such a way as to cause unnecessary suffering to individuals.[73]

It is known that napalm was used by Israeli forces in the Middle East war initiated June 5, 1967.[74] It is believed that a survey of the world's armed forces would demonstrate that virtually all of them have used or are prepared to use napalm or other "weapons employing fire" (e.g., flame-throwers) if such means are available to them. If this belief is correct, by the reasonable standards of the U.S. Army's Field Manual 27-10, such means, terrible as they may seem, are *not* considered "superfluous" in the practice of states. On the contrary, they are considered necessary and not generally disproportionate to the ends for which

they are normally used. Of course, if used indiscriminately or cruelly they would violate the basic principle of legitimate military necessity, just as indiscriminate use of firearms, artillery, or any other means of warfare would become legally impermissible if that principle were violated.

Unless there is a more definite and conspicuous abstention from the use of napalm, and other weapons employing fire, by belligerents and by armed forces in training throughout the world, it would seem that objection to military service based in part on the prospect that it will involve complicity in the use of such weapons ought to be based, not on SCO and on regard for the Nuremberg principles, but on CO on the grounds that modern war exceeds all normative limits. This is not to dismiss the very real moral and human arguments and explanations for a revulsion against the use of napalm and similar means of war but, again, we are talking about international law, not morality or humanitarian impulses.

Much more serious, in terms of international law, are the proscriptions against "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices," as well as "the use of bacteriological methods of warfare." In view of the broad scope of this study it will be necessary to compress the alternative analyses of these rules into rather clear-cut formulations of issues which doubtless do violence to a highly complex and controversial subject. But the following would seem to be the issues and the main alternative positions regarding so-called "CB" warfare (chemical-biological, taken from the formulation "ABC" warfare, i.e., atomic-biological-chemical):

(1) A very sweeping prohibition of the use in war of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices," as well as of "the use of bacteriological methods of warfare" is binding as conventional international law on all adherents to the Geneva Protocol of June 17, 1925. The United States and Japan are the only major powers which are not adherents to the Protocol.[75] *Question* (1): Does such a widespread, formal, and long-standing prohibition carry such weight

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as to engender obligations under international law for non-adherents?

(2) Upon analysis it appears that the prohibition of the Geneva Protocol of 1925 is really only against the *first* use of the proscribed means and that retaliation in kind against their first use would be permitted. It is also known that all serious military establishments are prepared to use CB warfare and train with a view to defense against CB warfare.[76] *Question* (2): Do these legal and practical limitations on the broad prohibitions of the Geneva Protocol lessen its importance, particularly as regards non-adherents?

(3) The practice of states since 1925 has seen virtually *no* use of CB warfare.[77] *Question* (3): Has the practice of states, by such a lengthy abstention from CB means, some of which became standard in World War I, produced a rule of *customary* international law, justifying expectations by statesmen, military commanders, and civilian populations that CB warfare will not be used, at least not in any circumstances other than as retaliation for similar or equally impermissible means?

(4) If there is a customary international law rule against the use, or at least the first use, of CB warfare, a question is raised as to the application of that rule with regard to a state, such as the United States, which is not a party to any conventional limitation on CB means. Yet, as we have noted, "international law is part of our law," according to the Supreme Court.[78] *Question* (4): Is the U.S. bound by a rule of customary international law not to use CB means, or to use them only as lawful reprisals after their first use by an enemy; and is this international legal obligation, if it exists, enforceable as a matter of municipal law and, therefore, relevant to the defense of a SCO that his nation is utilizing illegal means in the Vietnam war?

(5) On the other hand, it is argued that non-lethal gases are used almost universally to maintain internal order and that defoliants and crop-destroyers such as are being used in Vietnam are essentially domestic farm products. *Question* (5): Regardless of the status of lethal gases and controversial forms of biological warfare, is there not a valid exception to any alleged rule, name-

ly, that non-lethal gases and other materials permitted within the domestic public orders of the world should not be included in any general prohibition against CB warfare?

Before attempting to answer these five questions, one basic point should be made. The underlying issue (perhaps we should make it issue 6) is whether there is a definable category of "CB" means which are legally impermissible and whether use of *any* means within that category, no matter how reasonable in the abstract, is legally impermissible. In other words, does recourse to CB warfare in any form represent the crossing of a normative and practical threshold which has not hitherto been crossed, except by belligerents whose behavior was generally condemned? I would argue that, whatever the difficulties of defining CB warfare, there *is* a prohibited category of means, that these means were not in fact used by the major belligerents in World War II or the Korean War, and that the legal presumption is against their legal permissibility, no matter how "humane" or "proportionate" they might be.[79]

If this perspective be valid, one must say that the use, for the first time, of non-lethal gases "in war" by the U.S. in Vietnam represents a crossing of a legal threshold which, at best, is dangerous, and at worst may be illegal and highly dangerous to the hard-earned little corpus of law which governs this subject. In the light of this conclusion, I would answer the five questions posed as follows:

With respect to the first two questions,

(1) The Geneva Protocol of 1925 is a vulnerable document which is subject to a number of criticisms and abuses which need not concern us here. Alone, it would not bind a non-adherent such as the United States. It is also questionable whether it should prejudice all weapons developments after 1925 regardless of other considerations.

(2) However, concerning the third question, which seems to be central, it seems quite clear that, say, by the end of the Korean War, if not by the end of World War II, there was a rule of customary international law prohibiting CB means. The combination of *intent*, expressed in the Protocol of 1925, and *practice*,

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in the form of general abstention from the use of CB, even in major wars, has produced, I believe, an international law rule prohibiting the use of such means.

(3) Accordingly, the legal presumption is *against* the U.S. policies regarding non-lethal gas in Vietnam, the more so since such means were previously available to the U.S. and other belligerents and were, in fact, not used. The use of defoliants is a very marginal case which could go either way. The use of crop-destroyers probably falls within the general prohibition of CB means.

In the interests of brevity, it may be concluded that all of the U.S. policies in Vietnam involving possible violation of the ban on CB means are at best controversial and at least some of the means being used are probably not legally permissible. If this statement offends those who find these means innocuous if not positively humane as compared to means which are more destructive and which are not specifically regulated by international law, one can only say that the imperfect law of war which has developed must be taken as it is, not as it ought to be either in terms of higher values on the one hand or military necessity on the other. Since this paper is concerned with international law, not morality or public opinion, I can only state that, whereas the use of napalm for example is accepted, not specifically prohibited, and therefore not assimilable into the general rule of customary international law prohibiting CB means (even though it might have been and might be in the future), the use of any means, no matter how mild, which can reasonably be included in the forbidden category of CB warfare, is legally impermissible and will remain so unless the practice of states countenances exceptions.

The draftee infantryman may very well be obliged to use tear- and nausea-gas grenades and dispensers that are technically illegal under international law. A draftee might very well get involved in preparations for delivery by air of non-lethal gases as well as defoliants and crop-destroyers, in large quantities, perhaps in a rather indiscriminate fashion. He may thereby become, technically, a war criminal or an accomplice to acts that a war

crimes or other tribunal might deem to be contrary to international law. Just how important this prospect would loom in the total calculation by the individual as to the propriety of his serving in a particular war where such means were known to be in use must be left to the reader's judgment.

Finally, there is the international law proscription against "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity." There is no question whatever about the validity and binding force of this rule in conventional international law, particularly in the Hague Conventions of 1899 and 1907, and it is one of the principal specific rules that make up the content of "war crimes" as defined at Nuremberg.[80] There is, further, no doubt that members of the armed forces at all levels, from high commanders to privates, may be held legally accountable for violation of this rule. It is, therefore, perhaps the most relevant of all those which we have considered in connection with the Nuremberg basis for SCO.

Moreover, participation in measures of wanton destruction—burning, dynamiting, bulldozing, and otherwise destroying a population center or area of a countryside—is just as likely to be the lot of a serviceman in a combat zone as any other "detail." Naturally, the principal responsibility for controversial acts of destruction falls upon the commander. In many cases the ordinary serviceman will have little or no way of knowing whether the destructive acts in which he is engaged are legitimate or not. Some destruction is clearly permitted by military necessity, i.e., clearing a field of fire, or destroying dangerous cover which the enemy could use to approach one's lines. On the other hand, retaliatory destruction of whole villages because of guerrilla activity in the area is, generally speaking, considered to exceed legitimate military necessity. War crimes tribunals have given mixed, but, on the whole, lenient treatment to commanders and forces employing "scorched earth policies" as a means of delaying pursuit by a superior enemy. The latter category of cases involves a considerable balancing of prudential judgments, even in retrospect, for which the ordinary soldier ought not to be held too closely accountable.[81]

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Anyone who has an ordinary familiarity with recent conflicts in the Third World is aware that there is a comparatively high incidence of the kinds of destruction by ground troops which we have just termed generally unjustified by legitimate military necessity. Since guerrillas and regular forces using guerrilla tactics often blend into the indigenous society and utilize the population for all manner of vital functions and resources, the temptation is great for counter-insurgency forces to destroy entirely insurgent-held villages or even whole areas. The *rationale* may range from eliminating a source of persistent sniper fire to a systematic denial of food and shelter to the insurgents and their allies, willing or unwilling. We lack sufficient authority, I think, from the vast reports of war crimes trials and commentaries thereon after World War II adequately to judge this modern phenomenon of war. The problem was dealt with after World War II but it was always secondary to the basic problems of conventional military behavior. Now so-called sub-conventional war, or conventional war in a basically guerrilla warfare context, has become the central form of contemporary armed conflict and the definition of means of destruction "justified by military necessity" is extremely difficult. I can only conclude that there is a very real problem here that needs more clarification in positive international law on the one hand and more imagination and restraint on the part of belligerents on the other.

As to the individual who includes this important part of the Nuremberg concept of war crimes in his objections to a particular war and his arguments for SCO, it seems to me that we are back to the point made in discussing involvement in controversial behavior toward POW's and hostages. If the individual wants even general assurance that military service will not involve him in the war crime of wanton destruction unjustified by military necessity, in the kinds of wars which are presently being fought and which can be anticipated, I am inclined to think that it would make more sense to claim CO rather than SCO.

The international law relative to the protection of civilian persons in time of war (to use the language of the Geneva Convention of 1949) is summarized in Articles 42–56 of the 1907 Hague Convention on the Laws and Customs of War on Land and on the provi-

sions of the 1949 Geneva Convention. There is, then, a very substantial body of conventional law on this subject; more than on any other part of the law of war except that dealing with prisoners of war. There is, moreover, an enormous body of case law, international and national, arising out of World War II which deals with this subject. Accordingly, one might expect that it would furnish us with a great number of issues relevant to SCO based on the Nuremberg principles. In my opinion, however, this is not the case.

The reason, I think, for the comparative sparseness of provisions concerning the protection of civilians in war areas relevant to our inquiry is as follows: The law as codified in 1907 and again in 1949 is focused almost exclusively, with the exception of Article 3 of the 1949 Convention previously discussed, on international, i.e., *interstate* wars, not on civil wars or on mixed civil-international wars. The basic concept underlying both conventions is that of sovereign responsibility. When a territorial sovereign is displaced from part of its domain by an enemy invader, the (sovereign) invader assumes, so the traditional law runs, a temporary but significant responsibility under international law to act somewhat as a sovereign with respect to the civilian population and resources of the area under belligerent occupation.[82]

Everything in the traditional law flows from this concept of replacement of sovereign responsibility. The belligerent occupant is granted rights commensurate with the military necessities of continuing hostilities. There is a price, however, which the civilian population in the occupied areas must pay for this protection and assistance. The traditional law required that, when the regular forces of the territorial sovereign were displaced, the civilians should obey the orders of the belligerent occupant so long as they were consonant with international law. In a very real sense, the occupied population was *hors de combat,* much in the same manner as prisoners of war. The occupant's legal obligations rested on the assumption that most of the occupied population would, as far as possible, not contribute significantly to the continuation of the war effort by their own state or its allies.[83] The Second World War showed beyond doubt that this assumption is not valid in most modern war situations. One of the most conspicuous features of that war was the

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activity of resistance movements within occupied territories. Resistance activity ranged from spontaneous revolt to organized guerrilla operations by troops either left behind or infiltrated into occupied areas, or both. It is remarkable, and unfortunate for those who confront contemporary conflicts, that these developments were not adequately considered at Geneva when the 1949 Convention on this subject was drafted.

In the post-Korean conflict period, when conventional war directly involving any of the great powers became unlikely, the typical war has been a combination of a civil war and interventionary indirect aggression and counter-intervention involving, overtly or covertly, forces of foreign powers. It is obvious that these changes imply factual and doctrinal dilemmas which render unhelpful, if not irrelevant, international law rules based on past assumptions about war and its principal actors. Thus, if a joint U.S.–South Vietnamese–Korean force overruns and holds an area that was formerly a Vietcong stronghold and has more recently been jointly defended by the Vietcong and elements of the army of North Vietnam, the number of possible legal arguments as to legal title to and responsibility for the territory and the status of the occupants is too great to encumber these pages. Under these circumstances, the most sensible and humane approach to the law protecting civilian populations in war areas is to play down arguments about legal title and legitimacy and look to the practical needs of the civilian victims of war.

This involves, on the positive side, all and reasonable measures to maintain order, provide the basic necessities of life, and to protect the population from involvement in hostilities. In terms of limitations on the occupants of areas formerly held by an enemy—whether insurgents, alleged foreign "aggressors," or whatever—it would seem that the basic requirements of the traditional international law should serve as guides, if not as binding rules of conduct according to the conventional international law "on the books." Of these rules, only the most relevant and controversial will be mentioned here.

In the light of contemporary experience with mixed civil-international counter-insurgency conflicts it would seem that these limi-

tations, accepted in treaties to which the U.S. and most powers are parties, fall into three categories: (1) rules which ought to be observed regardless of the demands of military or political utility and convenience and which are not unreasonable even in terms of such utility; (2) rules which are so frequently and widely violated as to cast doubt as to their binding character and practicality; (3) rules which fall in a gray area between the first two categories.

Unfortunately, it appears to me, there are not many rules that fall in the first category. Pillage, for instance, is prohibited. It is not only unjust and illegal, it is contrary to true military and political utility, *particularly* in counter-insurgency wars. At this point, I am afraid, we exhaust the first category of rules which are clearly binding and which are reasonable, even from the standpoint of the belligerent occupant.

When we contemplate the other basic rules of conventional international law limiting belligerent occupants we are dealing with subjects which are difficult and controversial. Certainly this is the case with many in the second category, for example, the rule prohibiting the occupant from forcing the inhabitants of an occupied area to furnish information about the army of the other belligerent. As observed in our discussion of prisoners of war, interrogation, and torture, information about the enemy is by all odds the most important element both in insurgency and counter-insurgency operations, particularly in underdeveloped countries with difficult terrain.

A number of rules seem to belong to the third category of controverted and unclear provisions of the existing conventional law. For example, the rule protecting the occupied society from radical and purportedly permanent changes in social, economic, and political institutions has been dated since at least 1917.[84] Western "democratic," Communist, Fascist, and other occupying powers have undertaken immediate fundamental changes in territories under their control. On the other hand, it may be argued that *real* change in institutions is difficult in counter-insurgency conflicts where the fortunes of war ebb and flow and that the *appearance* of change often may be all that a temporary occupant can achieve. Accordingly, the practical importance of this rule is probably quite variable and

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at times marginal. Observance of the rule requiring due process of law in the passing of sentences and carrying out of executions is also subject to a number of qualifications and probably to be considered in the third, gray area.

I have deliberately left one rule to be considered separately. It is the rule that the "taking of hostages" is prohibited. I will conclude this survey of the law regulating hostilities with some comments on this rule because, first, it raises important and difficult issues in modern war and, second, it could be highly relevant to the service of an individual in a typical modern conflict and, therefore, to the issues of SCO.

If we were to review the other basic rules limiting occupation forces, I think that it would be apparent that, with the possible exception of the rule about forcing the inhabitants to give information, it is rather unlikely that the ordinary soldier, or even junior officer, would be forced to break them in a way for which he would be responsible under the laws of war.

The rule prohibiting the taking of hostages, however, does reach down to any and all troops in an occupied area. It concerns the seizure of members of the population in an occupied area, often persons of power and prestige, and holding them for the purpose of threatening and/or actually carrying out their execution both as a deterrent to and punishment for acts hostile to the occupying power.

Three things should be said about the "taking of hostages." *First*, the prohibition of the Geneva Convention of 1949 is aimed ultimately at the *execution* of hostages even though the sole verb in the rule is "taking." Unless hostages are occasionally executed in the course of a conflict the taking of hostages would be no more than an injustice and inconvenience rather than a major war crime. *Second*, international law was not clear on this subject until the 1949 Convention. There is no prohibition of the practice in the Hague Convention of 1907. We have a significant history of recourse to this sanction of occupation rights by belligerents in modern history. Moreover, the most elaborate judicial treatment of the subject, the U.S. military tribunal's decision in the "Hostage Case," condoned the taking and execution of hostages in extreme situations where all

law and order and all respect for the legitimate exercise of occupation powers had disappeared.[85] *Third*, to confuse the picture further, the history of contemporary military occupations leaves unanswered the question whether, on the whole, the taking and execution of hostages is an effective means of deterring and punishing opposition to an occupying power or whether it is rather a source of spiraling reprisals and counter-reprisals which incite the population and encourage resistance.

Rather than speculate on the various forms of participation in the taking and execution of hostages which might prove the lot of an individual soldier, I would prefer to leave the subject in this unsettled and ambiguous state as a final example of the practice and legal complications involved in determining: (1) the content and validity of the Nuremberg principles and the law of war; (2) the responsibility under municipal and international law for participation in acts regulated by these principles and rules of law. In this case, it would be easy for the individual SCO and his lawyer to look up the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War and read the clear language of Article 3 prohibiting the taking of hostages and the related language of the same article requiring due process of law before sentencing and carrying out sentences of members of an occupied area, even in armed conflicts "not of an international character" (thus, *a fortiori* in armed conflicts of a mixed civil-international character).

To the best of my knowledge, taking and executing hostages in the manner of World War II practice by Germans, for example, has *not* been charged against the United States and its allies in the Vietnamese conflict. Very possibly the U.S. experts in counter-insurgency have learned the lessons ignored by the Germans in World War II and have decided not to try to win "The Other War" for the loyalty of the indigenous population by threats and reprisals against hostages. But desperate circumstances, such as an intense campaign by the enemy based in large measure on the taking and threatened execution of hostages, might well drive the South Vietnamese, the United States, and other allies to contemplate retaliation in kind. If this were to occur—or if it could be shown that something like a hostage policy has already been employed in Vietnam—an addi-

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Conclusions

If this analysis seems inordinately inconclusive for a comparatively detailed treatment of the subject of SCO and the Nuremberg principles, the author will deem his effort successful. For the purpose of this study has been neither to encourage nor discourage SCO generally or SCO on the basis of regard for international law as interpreted and applied by the United States. It has been concerned with penetrating facile rhetoric and purported statements of law on all sides of the controversy to demonstrate the limits, possibilities, and ambiguities of appeals to international law as a basis for SCO.

On the basis of this study the following conclusions appear to be warranted:

(1) The claim that a war is illegal under international law and that, therefore, any participant in such an illegal war risks treatment as a war criminal is not a good basis for SCO, either under international or United States law.

(2) Objections to allegedly illegal military, political, and other policies not directly involving the individual soldier are not very relevant to claims for SCO since they fall within the legal responsibility of high-level decision-makers who have voluntarily assumed their positions and participated in the making of these policies.

(3) The really relevant portion of the Nuremberg principles and of the law of war, insofar as the SCO in or out of the armed forces is concerned, is eminently that of "war crimes and crimes against humanity," i.e., the law governing the conduct of hostilities and belligerent occupation. Although there is a substantial body of conventional law on these subjects, each rule must be carefully considered in order to determine its meaning, its present validity in the light of the practice of states, and its practical feasibility in the mixed civil-international conflicts, mainly in the difficult

terrain of underdeveloped countries, before serious consideration should be accorded claims that it is violated and further claims that these violations justify refusal to participate in the war with respect to which the violations are alleged.

(4) There appears to be such a widespread tendency to violate some of the most definite laws of war—e.g., concerning denial of quarter; torture to obtain vital information; extremely broad interpretations of "military necessity" as justification for widespread destruction of inhabited towns and whole areas; and, possibly, reprisals against rebellious civilian populations such as the taking and execution of hostages—as to create a troublesome gap between the "law on the books" in international conventions and the usage of belligerents. This gap vastly complicates the task of the SCO whose principal objection to a particular war is its illegal conduct.

(5) Many of the most controversial methods of war, e.g., napalm, are not explicitly regulated by the law of war except by the broad principles of legitimate military necessity and proportionality. Hence SCO based on objections to means must be primarily moral and humanitarian rather than legal.

(6) Virtually all of the objections based on the Nuremberg principles and the law of war generally tend to apply across the board to most recent and foreseeable wars, thus raising the question whether the more persuasive claim might not be for CO on the grounds that all modern warfare exceeds permissible legal and moral limits, rather than that a *particular* war exceeds those limits.

However, I must say that the foregoing conclusions are reached with reluctance and a feeling that something is very definitely wrong with the present relationship between U.S. municipal law and international law. For, notwithstanding the many difficulties which I have mentioned, a dilemma remains for any American who takes seriously international law and official U.S. pronouncements supporting it. There is something wrong with a system which acknowledges the binding effect of international law, particularly conventional law, but which, apparently, manages to exclude most of this law from cases involving individual citizens who claim the right to invoke it as the basis for SCO. If the federal courts will not rule on "crimes against the peace" on the grounds that the claim in-

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volves "political questions," this is perhaps regrettable but understandable. But for the federal courts to refuse, as they apparently have, to consider international law "part of our law," and to apply it—particularly when it is formulated in treaties to which the U.S. is a party—directly in cases involving individual charges that United States policy concerning conduct of a particular war is illegal under both international and domestic U.S. law, is to leave a situation which would seem to require a restatement of the U.S. position on international law.

With respect to the law of war, international law is part of the law of the United States, *if* the Executive and/or the Legislative branches waive the preeminence which they have and which the Judiciary has accepted. In other words, the courts apparently are relatively powerless to protect individual SCO's from forced participation in violations of the law of war ordered and/or acquiesced in by the Executive and the Congress.

Yet it is axiomatic that the municipal laws of a state and the peculiarities of its internal constitutional processes do not release it from its responsibilities and obligations under international law. Nor, under the Nuremberg precedent, do the pleas of "act of state" or "superior orders" absolve the individual from responsibility for acts violative of international law. It would seem that the federal Judiciary will have to confront the issues raised by those who claim SCO on the basis of Nuremberg and international law, or else add another chapter to the record of judicial retreat before the determined advances of the Executive in the pursuit of its broad powers to conduct foreign relations and national security affairs. If this is to be the case, perhaps a somewhat more charitable note might be taken with respect to those defeated enemies of World War II who, also, were often caught up in the domestic laws, practices, and personal dilemmas of wartime and who were treated as war criminals.

NOTES

[1] U.S. Department of State, *Trial of War Criminals*, 13; Department of State Publication No. 2420 (1945), 39 AM. Jl. Intl. Law Supp. 257 (1945).

The other wartime "United Nations" which adhered to the London Agreement in conformity with Article 5 thereof were: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.

See the United Nations War Crimes Commission, *The United Nations War Crimes Commission and the Development of the Laws of War* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, 1948), p. 457, for the text of the Agreement of August 8, 1945, to which the London Charter was annexed. (Hereinafter cited as *UN War Crimes Commission.*)

The most convenient source document is Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression, Opinion and Judgment* (Washington: U.S. Government Printing Office, 1947). Portions of the *Judgment* quoted on pp. 1–4 summarize the basic provisions of the Charter. For convenience this source, hereinafter cited as *Nuremberg Judgment*, will be cited and quoted as the principal primary source on the trial of the major war criminals before the Nuremberg International Military Tribunal.

The basic source document for the Nuremberg trials of major war criminals is Nuremberg International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November, 1945–1 October, 1946 (published at Nuremberg, Germany, 1948), 42 volumes. The Judgment of the Tribunal appears in Vol. XXII, pp. 411–589. (This source will be cited hereinafter as NIMT, *Trial of Major War Criminals.*)

[2] *Nuremberg Judgment*, p. 1.

[3] *U.N. War Crimes Commission, op. cit.;* John Alan Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merrill, 1954).

The Nuremberg Trials held by the United States are extremely well reported in a carefully edited series, *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at

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Nuremberg, October, 1946–April, 1949 (Washington: U.S. Government Printing Office, 1951), 15 volumes. (Hereinafter cited as *U.S. Trials of War Criminals—Nuremberg.)*

These trials are also covered in part in an invaluable series of reports and analyses of virtually all international and national war crimes proceedings of note by the United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, 1947), 15 volumes. Volume 15 contains an analytical summary of all of the principal charges, issues, and defenses and the law on each as it emerged from the practice of the tribunals.

4 See Hersch Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases* (London: Butterworth), for the years 1945–1949; the same and succeeding editors under the title *International Law Reports*, since the 1950 edition.

5 *Nuremberg Judgment*, pp. 3, 4.

6 *Ibid.*, p. 4.

7 See Herbert W. Briggs, ed., *The Law of Nations, Cases, Documents and Notes*, 2nd ed. (New York: Appleton-Century-Crofts, 1952), pp. 96–98 and authorities cited therein; William W. Bishop, Jr., *International Law, Cases and Materials*, 2nd edition (Boston/Toronto: Little Brown, 1962), pp. 266, 267. The basic provisions of the U.N. Charter prohibiting first recourse to force as an instrument of foreign policy are found in the Preamble, in the Purposes set forth in Article 1, and most definitely in Article 2, paragraph 4, which states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Sanctions in support of this rule are provided for in Chapter VII of the Charter and Chapter XVII.

8 In the Judgment of the Nuremberg International Military Tribunal only Streicher and von Schirach were found guilty of crimes against humanity but not of war crimes. Admirals Doenitz and Raeder were the only defendants found guilty of war crimes but not of crimes against humanity. The following were found guilty of what were characterized as "war crimes and crimes against humanity": Goering, Hess, von Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Funk, Sauckel, Jodl, Speer, Fritzsche, and Bormann. See *Nuremberg Judgment*, pp. 108–166. Seys-Inquart was, in effect, found guilty of "war crimes and crimes against humanity." See *Nuremberg Judgment*, pp. 54–55.

A typical linking of the two counts is demonstrated by two of the best-

known of the U.S. war crimes proceedings at Nuremberg. In U.S. v. von Leeb *et al* ("The High Command Case"), Count One was "Crimes Against the Peace," Count Four was "Common Plan of Conspiracy." Count Two was "War Crimes and Crimes Against Humanity: Crimes Against Enemy Belligerents and Prisoners of War." Count Three was "War Crimes and Crimes Against Humanity: Crimes Against Civilians." *U.S. Trials of War Criminals—Nuremberg*, Vol. X, "The High Command Case," pp. 13–48.

Likewise, in U.S. v. List *et al*, "The Hostage Case," all four counts charged "War crimes and crimes against humanity" of various kinds. *Ibid.*, Vol. XI, pp. 765–776.

[9] I have analyzed the International Military Tribunal's handling of this approach in "Military Necessity in International Law" 1 *World Polity* 109, 142–147 (Institute of World Polity, *World Polity, A Yearbook of Studies in International Law and Organization:* Utrecht/Antwerp: Spectrum Publishers, 1957) wherein the relevant passages of M. de Menthon's position are quoted, the silence of the International Military Tribunal on this position interpreted, and the rejection of this approach by the U.S. Military Tribunals at Nuremberg in the "High Command" and "Hostages" cases noted, with appropriate quotations. Relevant commentaries are cited therein. For the relevant passages of the "High Command Case," U.S. v. von Leeb *et al*, see *U.S. Trials of War Criminals*, Vol. XI, pp. 485–491: "The Hostage Case," U.S. v. List. *Ibid.*, pp. 1246–1248; see also the account of the latter disposition of this question in U.N. War Crimes Commission, *Law Reports of Trials of War Criminals, op. cit.*, in the commentary on the Hostage case entitled, "The Irrelevance to the Present Discussion of Illegality of Aggressive War," Vol. VIII, pp. 59, 60. M. de Menthon's presentation may be found in NIMT, *Trial of the Major War Criminals Before the International Military Tribunal, op. cit.*, Vol. V, pp. 368–391. In an article criticizing de Menthon's approach Paul de la Pradelle notes that it was abandoned by the French prosecutor Dubost in his final statement and that the Tribunal did not discuss it in the Judgment. See his article, "Le Proces des grands criminels de guerre et le developement du droit international," extrait de la *Nouvelle Revue de droit international privé* (Paris: Les Editions Internationales, 1947), pp. 15, 16.

[10] This attitude has been examined by Martin O. Milrod in his unpublished M.A. dissertation of June, 1959, at Georgetown University, "Prisoners of War in Korea: The Impact of Communist Practice Upon International Law." At the time of the Korean War neither North Korea nor the Chinese People's Republic were parties to the several

S. war crimes proceedings at Nuremberg. In U.S. v. "The High Command Case"), Count One was "Crimes ce," Count Four was "Common Plan of Conspiracy." "War Crimes and Crimes Against Humanity: Crimes Belligerents and Prisoners of War." Count Three was nd Crimes Against Humanity: Crimes Against Civil- *ls of War Criminals—Nuremberg*, Vol. X, "The High ," pp. 13–48.

U.S. v. List *et al*, "The Hostage Case," all four counts rimes and crimes against humanity" of various kinds. pp. 765–776.

the International Military Tribunal's handling of this ilitary Necessity in International Law" 1 *World Polity* nstitute of World Polity, *World Polity, A Yearbook of rnational Law and Organization:* Utrecht/Antwerp: ishers, 1957) wherein the relevant passages of M. de tion are quoted, the silence of the International Mili- n this position interpreted, and the rejection of this e U.S. Military Tribunals at Nuremberg in the "High "Hostages" cases noted, with appropriate quotations. entaries are cited therein. For the relevant passages of mand Case," U.S. v. von Leeb *et al*, see *U.S. Trials of*, Vol. XI, pp. 485–491: "The Hostage Case," U.S. v. List, –1248; see also the account of the latter disposition of U.N. War Crimes Commission, *Law Reports of Trials of op. cit.*, in the commentary on the Hostage case enti- evance to the Present Discussion of Illegality of Aggres- VIII, pp. 59, 60. M. de Menthon's presentation may be , *Trial of the Major War Criminals Before the Interna- Tribunal, op. cit.*, Vol. V, pp. 368–391. In an article crit- thon's approach Paul de la Pradelle notes that it was he French prosecutor Dubost in his final statement and al did not discuss it in the Judgment. See his article, "Le ds criminels de guerre et le developement du droit in- xtrait de la *Nouvelle Revue de droit international privé* tions Internationales, 1947), pp. 15, 16.

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Geneva conventions of 1949 relative to treatment of prisoners of war and other wartime problems. Milrod observes that:

> The USSR and its "bloc" (there perhaps was a "bloc" in those days) entered a reservation to Article 85 of the Convention, which relates to war criminals. Extending what was originally a French proposal, they adopted at Geneva the following approach: "Some delegations maintained that those who transgress the laws of war forfeit their benefits by placing themselves outside of the law. Prisoners condemned under the regulations established at Nuremberg did not come under international law, it was argued, but should be treated as common law criminals." See Angenor Krafft, "The Present Position of the Red Cross Geneva Conventions," 37 *Grotius Society Transactions* 131 (1951), p. 138. Quoted in Milrod, *op. cit.*, p. 136. Milrod cites the de Menthon arguments at Nuremberg, *Ibid.*

The communist belligerents further manipulated the Nuremberg principles by sweeping interpretations of the concept of war crimes and crimes against humanity, in addition to crimes against the peace, so that the basic protection of U.N. POW's was placed in question. See Dept. of State, *General Foreign Policy Series 34*, Conventions of 12 August, 1949 (Pub. No. 3938) (Washington: U.S. Government Printing Office, 1950); also reproduced in Dept. of the Army *Pamphlet No. 20-150* (Washington: U.S. Government Printing Office, 1950) p. 252; as cited in Milrod, *op. cit.*, p. 137.

[11] For the text of the Genocide Convention see Res. No. 260 (III) A, U.N. Gen. Ass. Off. Rec., 3rd Sess. (I), Resolutions, p. 174; U.N. Doc. No. A/810; U.S. Dept. of State Publ. No. 3416 (1949); 45 *American Journal of International Law* Supplement 6 (1951). The source quoted here is Bishop, *International Law, op. cit.*, p. 476.

[12] *Idem.*

[13] *Idem.*

[14] *Idem.*

[15] *Idem.*

[16] Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, ' vision of International Law, 1944). Raphael Lemkin, "Genocide as a Crime Under International Law," 41 *American Journal of International Law* 145 (1947).

[17] See Commission of Responsibilities, Conference of Paris, *Violations of the Laws and Customs of War*, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919 (Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32; Published for the Endowment; Oxford: At the Clarendon Press, 1919),

Annex II, Memorandum respecting Reservations by the United States of America, pp. 58–79; *U.N. War Crimes Commission*, pp. 39, 40.

[18] The two landmark Supreme Court decisions are Whitney v. Robertson, 124 U.S. 190 (1888); Cook v. U.S., 288 U.S. 102 (1933).

[19] See U.S. v. Belmont, 301 U.S. 324 (1937); U.S. v. Pink, 315 U.S. 203 (1942).

[20] 175 U.S. 677 (1900) as quoted in Bishop, *International Law, op. cit.*, p. 27.

[21] See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Lyman M. Tondel, Jr., ed., *The Aftermath of Sabbatino*, Background Papers and Proceedings of the Seventh Hammarskjold Forum, Richard A. Falk, Author of the Working Paper (Published for the Association of the Bar of the City of New York by Oceana Publications, Dobbs Ferry, N.Y., 1965); Ulf Goebel, *Challenge and Response* (Portland, Oregon: University of Portland Press, 1964).

[22] Department of the Army, July, 1956, FM 27–10, Department of the Army Field Manual 27–10, *The Law of Land Warfare* (Washington: U.S. Government Printing Office, 1956).

[23] Nicholas von Hoffman, "Nuremberg Defense Allowed in Levy Trial," Washington *Post*, May 18, 1967.

[24] Colonel Brown was quoted in Nicholas von Hoffman's story, "Levy Is Dealt Trial Setback," Washington *Post*, May 26, 1967.

[25] U.S. v. Mitchell, 369 F. 2nd 323 (1966).

[26] *Ibid.*, p. 324.

[27] *Ibid.*

[28] 386 S 972, 87 S. Ct. 1162 (1966).

[29] *Idem.*, p. 153

[30] *Idem.*, p. 154

[31] 88 S. Ct. 282 (1967). Dissents by Stewart and Douglas at 282–285. See Fred P. Graham, "Stewart Bids Court Weigh Legality of U.S. War Role," *The New York Times*, November 7, 1967, pp. 1, 15.

[32] Edward S. Corwin, *Total War and the Constitution* (New York: Knopf, 1951); Clinton Rossiter, *The Supreme Court and the Commander-in-Chief* (Ithaca, New York: Cornell University Press, 1951).

[33] U.N. War Crimes Comission, *Law Reports of Trials of War Criminals, op. cit.*, Vol. XV, p. 156.

[34] See William V. O'Brien, "The Meaning of 'Military Necessity' in International Law," 1 *World Polity* 109–176 (1957); William V. O'Brien, "Legitimate Military Necessity in Nuclear War," 2 *World Polity* 35–120.

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58–79; *U.N. War Crimes Commission*, pp. 39, 40.
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O'Brien, "The Meaning of 'Military Necessity' in Inter-
1 *World Polity* 109–176 (1957); William V. O'Brien,
ilitary Necessity in Nuclear War," 2 *World Polity*

35 "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Art. II, paragraph 4 of the U.N. Charter.

36 See J. L. Brierly, *The Law of Nations*, Sir Humphrey Waldock, ed. (6th ed.; New York/Oxford: Oxford University Press, 1963), pp. 416–421.

37 See *supra*, p. 159 and note 9.

38 See *supra*, p. 159.

39 See D. P. O'Connell, *International Law*, 2 vols (London: Stevens; Dobbs Ferry, N.Y., 1965), Vol. I, pp. 37–88 on the question generally; pp. 67–71 on U.S. law and practice.

40 Article 23 of Hague Convention IV of 1907 Respecting the Laws and Customs of War provides:

"In addition to the prohibitions provided by special Conventions, it is especially forbidden—

". . . c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.

"d. To declare that no quarter will be given; . . ." DAP 27–1, p. 12.

41 Common Article III of the Geneva Conventions of August 12, 1949, for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in Time of War, provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria. . . . (*Ibid.*, pp. 24–25, 49, 67–68, 135–136.)

42 See *Ibid.*, pp. 67–134.

43 *Nuremberg Judgment*, p. 4.

44 See DAP 27–1, *op. cit.*, pp. 67–134; FM 27–10, Chapter 3, pp. 25–82.

45 See the texts of the four conventions, *Ibid.*, pp. 24–25, 48–49, 67–68, 135–136.

46 *Ibid.*, pp. 72–73.

[47] Eric Norden, "American Atrocities in Vietnam," *Liberation* (February, 1966), pp. 14–27.

[48] The Lawyers Committee on American Policy Towards Vietnam, *Vietnam and International Law* (Flanders, N.J.: O'Hare Books, 1967), p. 62.

[49] William V. O'Brien, "The Prospects for International Peacekeeping," James E. Dougherty and J. F. Lehman, Jr., eds., *Arms Control for the Late Sixties* (Princeton: Von Nostrand, 1967), pp. 213–230.

[50] Norden, *op. cit.* pp. 116, 119–20.

[51] See O'Brien, *The Meaning of Military Necessity, op. cit.* (see n. 73, p. 25) and authorities cited therein.

[52] See Hague Convention IV, Respecting the Laws and Customs of War on Land, of 18 October, 1907, in DAP 27–1, Preamble, pp. 5–6, and, in particular, Articles 22 and 23, pp. 12–13.

[53] See *supra*, pp. 206–207.

[54] FM 27–10, pp. 3–4.

[55] See H. Lauterpacht, "The Problem of the Revision of the Law of War," 29 *British Yearbook of International Law* 361 (1952).

[56] Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 3 Hudson, *International Legislation* 1670–72 (1931). (Hereinafter cited as *Geneva Gas Protocol, 1925.)*

[57] *Nuremberg Judgment*, p. 4.

[58] See *infra*, p. 167.

[59] See William V. O'Brien, "Legitimate Military Necessity in Nuclear War," 2 *World Polity* 35, 83–86 and authorities cited therein (1960).

[60] *Ibid.*, pp. 85–86.

[61] See Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven & London: Yale University Press, 1961), pp. 71–80. They quote Lauterpacht's statement from the Article cited *supra*, n. 126, that:

> . . . It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object *per se* would inevitably mean the actual and formal end of the law of war. For that reason, so long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapons of terror now incidental to lawful operations must be regarded as an absolute rule of law. *(Op. cit.*, pp. 364–365.)

[62] O'Brien, *Legitimate Military Necessity in Nuclear War, op. cit.*, pp. 35, 43–57.

[63] William V. O'Brien, "The Meaning of 'Military Necessity' in International Law," 1 *World Polity*, pp. 109, 138 ff.

[64] O'Brien, *Legitimate Military Necessity in Nuclear War, op. cit.*, pp. 63–65.

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World Polity, pp. 109, 138 ff.

nate Military Necessity in Nuclear War, *op. cit.*, pp.

65 I develop this line of thinking in William V. O'Brien, *Nuclear War, Deterrence and Morality* (Westminster, Md.: Newman Press, 1967), pp. 77–80.

66 See U.N. War Crimes Commission, *Law Reports of Trials of War Criminals*, XV, 110.

67 Richard A. Falk, "The Shimata Case: A Legal Appraisal of the Atomic Attack on Hiroshima and Nagasaki," *American Journal of International Law*, Vol 59, pp. 789–793. This article discusses a decision of the District Court of Tokyo. See *Japanese Annual of International Law* for 1964, pp. 212–52; digested in *American Journal of International Law*, Vol. 58, p. 1016, 1964.

68 The Netherlands Government, *Documents Relating to the Program of the First Hague Conference*. (New York: Oxford University Press for the Carnegie Endowment for International Peace, 1921), p. 25.

69 DAP 27–1, p. 12.

70 M. W. Royse, *Aerial Bombardment* (New York: Vinal, 1928). McDougal and Feliciano, *Law and Minimum World Public Order*, *op. cit.*, pp. 615–618 and authorities cited therein.

71 Clergy and Laymen Concerned about Vietnam, *In the Name of America* (New York, 1968), pp. 269–270.

72 FM 27–10, art. 34, p. 18.

73 *Ibid.*, art. 36, p. 18.

74 See, for example, Randolph S. Churchill and Winston S. Churchill, *The Six Day War* (Boston: Houghton Mifflin, 1967), pp. 171, 173, and 182.

75 Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Manley O. Hudson, *International Legislation* (Washington/New York, Carnegie Endowment for International Peace, 1931–1950), Vol. III, pp. 1670–1672 (1931).

76 William V. O'Brien, "Biological/Chemical Warfare and the International Law of War," 51 *Georgetown Law Journal* (1962), pp. 28–32.

77 *Ibid.*, pp. 32–37, 56–57 and authorities cited therein.

78 See *supra*, p. 173.

79 O'Brien, "Biological/Chemical Warfare and the International Law of War," *op. cit.*, pp. 57, 63.

80 See *supra*, p. 176.

81 See United Nations War Crimes Commission, *Law Reports of War Criminals*, *op. cit.*, Vol. XV, pp. 175–176, for a summary of war crimes law on this subject. The best-known and most-cited cases are the "High Command" and "Hostage" cases tried before the U.S. Military Tribunal at Nuremberg. See *U.S. Trials of War Criminals—Nuremberg*, *op.*

cit., Vol. XI. The Judgments and relevant passages are to be found on pp. 462, 541, 609 for the "Hostage Case" 1230, 1232–1233, 1253–1254, and especially, the comments on the German scorched-earth tactics in their retreat from Finnmark, Norway, in 1944, 1295–1297 153.

[82] Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington: Carnegie Endowment for International Peace, 1942), pp. 10–11.

[83] Julius Stone, *Legal Controls of International Conflict*, 1st ed (New York: Rinehart, 1954), pp. 723–732.

[84] Feilchenfeld, *International Economic Law of Belligerent Occupation, op. cit.*, pp. 17–29.

[85] *U.S. Trials of War Criminals—Nuremberg, op. cit.*, Vol. XI, pp. 1209–1222, and in the Judgment, pp. 1230, 1232, 1244–1253.

and would have been brought to a complete standut four months if:
gs plants had been attacked at one and the same time.
d been repeated three or four times at intervals of four- without regard to the bomb-plots.
at reconstruction had been attacked every eight weeks by heavy raids, and if the execution of this total bombing continued for six months.
deceptive, and consequently too great an interval acks. It is therefore better to time attacks on the

IT
lid the attack of tank assembly plants affect the rman armoured units?
attack of ordnance depots deprive armies in the ry equipment?

particularly effective upon Tiger tank production . As, however, hulls, suspensions, torsion bars and ply at the time as a result of raids on other factories, bly plants was not directly affected by the attacks. not taken place no greater output could have been

out was on the average some 30% below schedule, g the shortage of supplies of materials and com-

ware supplies of weapons and equipment were not thanks to the decentralised organisation of the pots. I cannot speak for the effect upon food and

id the bombing of shipyards affect the U-boat e?
ways was the U-boat construction programme

pyards was conditioned by the delivery of electric that the attacks on the shipyards themselves did utput of U-boats. Moreover, U-boats which had d and repaired within a short time. The reduction ge inflicted on the yards, would be about 10%.
of the electrical industry, which was responsible lectric motors, and of the factories manufacturing product constituted particular bottlenecks because ed triple the quantity of equipment per boat.

The factories in Hagen and Vienna manufacturing accumulator batteries were destroyed, and Posen was lost to us, *but the largest accumulator factory, ('Aafa') at Hanover remained intact. If the last-named factory had been destroyed, the construction of U-boats would have had to be abandoned four weeks later.*

ALBERT SPEER

OTHER INDUSTRIES

18. **Q.** (a) Were grave difficulties caused to the German war effort by damage to any other particular industry?

(b) Can you suggest any other class of target in the German war industry the attack of which would have been more effective in reducing Germany's war potential than the attacks which were actually carried out?

A. (a) Considered as already answered in the replies to previous questions.

(b) *Yes, by means of a more logical form of attack on industrial targets.* No dispersal of effort on final manufacturing processes or upon transport for both of these require too great a number of attacks and after a certain time it is possible to provide alternative facilities.

It is only by producing a bombing plan aimed at certain vital targets resulting in the elimination of a horizontal section (Querschnittsfactor) of industry that more rapid success may be obtained. In this connection the sequence of attacks must be speeded up in order to render reconstruction impossible.

S4C?

The destruction of the ball bearings industry, at the cost of a small expenditure of effort, would have caused a complete standstill of armaments and war production within a period of four months, and in certain important spheres even within from 14 days to eight weeks.

?!

Attacks on the electric power stations would have had to include a comparatively large number of plants as our grid system like that of England, is unique in the world and we possess many small and medium power stations. Despite this, however, according to the estimate of the Reich electricity controller (Reichsverteiler) the failure of 60% of the total electric power production would have sufficed to cause the complete collapse of the entire electrical network. In countries where the number of power stations is smaller and in the absence of an extensive grid system the average capacity of each station is somewhat greater, the *destruction of power stations is the most effective means of bringing the whole of industry and public life immediately to a standstill. This and the gas industry are the only spheres where it is impossible to create reserves and build up stocks between the producer and the consumer which can postpone the effects of bombing for several months.* But products can be stockpiled.

Another industry which falls within the scope of the question is the chemical industry including the synthetic oil plants. In this connection, however, the nitrogen plants must also be attacked in order to bring about a standstill in powder and explosives manufacture. In this connection it has emerged that the processing of crude oil by means of the comparatively primitive process used by the refineries can be continued despite attack.